Supreme Court, U.S.
FILED
JUL 12 1996
CLERK

No. 95-2034

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

KARL A. SCHLEDWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and 30,000 affiliate members, including representatives from every state. The American Bar Association awards NACDL full representation in its House of Delegates. NACDL was founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of

[1] All parties have consented in writing to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.

the criminal defense profession; and to promote the proper and fair administration of criminal justice.

The criminal defense attorneys who comprise the NACDL have long been dissatisfied with the restrictive rules governing federal criminal discovery and the criminal discovery rules of most states, many of which provide even less opportunity for pretrial discovery than the federal system. Because of the extremely limited scope of criminal discovery, this Court's constitutional decisions regarding the scope of the government's *Brady* obligations are exceptionally important to the fair operation of the criminal justice system. Nothing could be more pernicious than the rule adopted by the Sixth Circuit, which encourages prosecutors to disregard their *Brady* obligations whenever *in their view* the defendant is capable of discovering similar exculpatory information on his own.

REASONS FOR GRANTING THE PETITION

This Court is well aware of the restricted scope of federal criminal discovery. *See Degen v. United States*, 116 S.Ct. 1777, 1996 U.S. LEXIS 3719, *11 (1996). The Court may not know that in many states a defendant's right to criminal discovery is even more limited. In Virginia, for example, there is no equivalent of the Jencks Act and a primitive trial by ambush is the state sanctioned norm. In states where there is virtually no criminal discovery, the *Brady* rule assumes a still more important function than in federal cases since it often provides the only real basis for discovery of material exculpatory evidence.

The "due diligence" exception to *Brady* adopted by the Sixth Circuit and some other courts seriously undermines the effectiveness of the *Brady* rule and is plainly at odds with its purpose. It is no exaggeration to say that the criminal justice system cannot function properly if prosecutors disregard their obligations under *Brady*. Since the "due diligence" exception strongly encourages prosecutors to do just that, it is vitally

important that this Court make clear that a prosecutor's speculation about a defendant's supposed ability to discovery exculpatory information with his own resources is no excuse for the prosecution's failure to disclose that information upon request by the defense -- even if a court later agrees with the prosecutor's view of the defendant's capabilities.

It is common knowledge that prosecutors often fail to comply fully -- or comply at all -- with their *Brady* obligations and that they usually get away with it.[2] And when *Brady* violations do come to light prosecutors are almost never disciplined, even for egregious misconduct. After reciting several then-recent instances of blatant *Brady* violations in federal cases, Reid Weingarten, the Chairman of the White Collar Crime Committee of the ABA's Criminal Justice Section, observed that

> at some point in the last decade, the insidious and dangerous notion that corners can be cut by the

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[2] "Difficult as it is to enforce the *Brady* rule in the pretrial discovery and trial phases of a case, it is even more difficult to find and then exploit suppressed exculpatory evidence during the post-conviction phase of criminal litigation." Harvey A. Silvergate, *Admitting Error in Brady Cases*, Criminal Law Advocacy Reporter 259 (1993). Mr. Silvergate observes that "once a prosecutor has taken the step of withholding exculpatory evidence at trial, he or she can hardly be expected to suddenly comply with post-verdict requests for disclosure. . ." *Ibid.* In most jurisdictions, the same prosecutor who tried the case is responsible for responding to post-conviction attacks, thereby enabling him to continue to conceal exculpatory evidence. Some trial judges are also "hesitant to admit that a trial over which he or she presided might have resulted in a due process violation, or that a defendant whom the judge grew to believe committed a heinous crime and whom he may have sentenced to life imprisonment or even death, may in fact be innocent." *Id.* at 260. *See also United States v. Bagley*, 473 U.S. 667, 702 (1985) (Marshall, J., dissenting) ("The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor.").

> government to catch and convict big criminals seeped into many United States Attorneys' Offices. This notion was fueled by Supreme Court decisions denying "undeserved" windfalls to defendants for prosecutorial misconduct and basically removing judicial supervision from the grand jury process. I believe these decisions emboldened prosecutors to become more aggressive. The prospect of an OPR or Bar referral somewhere down the road is not an effective deterrent to a (over) zealous prosecutor who, in the heat of battle, concludes that disclosure of "arguable" *Brady* material will kill his case and allow the "guilty" to go free.
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> * * *
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> The cure will come when trial judges have the tools and the will to come down on prosecutors who violate the rules.[3]

Judges and members of Congress have repeatedly voiced their frustration and dismay at the Department of Justice's failure to discipline prosecutors who engage in misconduct. For example, in 1990 the House Committee on Government Operations attempted to track ten then-recent cases in which federal courts found there was serious prosecutorial misconduct to determine whether DOJ took any disciplinary action. After stonewalling for more than five months, the DOJ informed the Committee that five of the ten cases were "administratively determined not to involve conduct sufficiently serious to warrant disciplinary action, and were not referred" to the Office of Professional Responsibility (OPR). Of the five cases that were referred to OPR, three were determined not to warrant disciplinary action and two remained

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[3] "Chairman's Corner," White Collar Crime Committee Newsletter (Jan./Feb. 1994).

open in OPR. The DOJ offered no explanation of its reasons for disagreeing with the judicial findings of misconduct.[4]

In 1987 Professor Richard A. Rosen of the University of North Carolina School of Law surveyed the extent to which prosecutors had been sanctioned for suppressing *Brady* material. Since 1963, when *Brady* was decided, Professor Rosen was able to find only nine cases in which bar discipline was *even considered* for a *Brady* violation. The prosecutors received some sanction in approximately half of those nine cases.[5]

In light of all this, the courts must not adopt a rule of law that *encourages* prosecutors to conceal exculpatory information, secure in the knowledge that if their concealment later comes to light they can justify their conduct by arguing that the defendant could have discovered the same exculpatory information if only his attorney had been more diligent.

The standard of materiality this Court has adopted to implement the *Brady* rule allows the prosecutor to be the judge of when potentially exculpatory evidence must be disclosed to the accused. As Justice Marshall convincingly argues in his dissent in *Bagley*,

> the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor

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[4] *Federal Prosecutorial Authority in a Changing Legal Environment -- More Attention Required: Hearings Before the House Committee on Governmental Operations*, 101st Cong., 2d Sess. 24-25 (1990). *See also Secret Discipline of Prosecutors Raises Accountability Issues*, Washington Post, January 15, 1993 at A1, A18.

As bad as the situation is with federal prosecutors, it is far worse with state prosecutors who are usually responsible for the most reprehensible *Brady* violations, frequently in capital cases. *See e.g., Banks v. Reynolds*, 54 F.3d 1508, 1510-11 (10th Cir. 1995); *Kyles v. Whitley*, 115 S.Ct. 1555 (1995).

[5] Cris Carmody, *The Brady Rule -- Is It Working?* The National Law Journal, Vol. 15, No. 37 (May 17, 1993) at 30.

> is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the Fourth Amendment's requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor.

United States v. Bagley, 473 U.S. 667, 696-97 (1985) (Marshall, J., dissenting).

The NACDL is not asking the Court to reconsider *Bagley*. We *are* asking the Court to not give the prosecutor the much more problematic job of deciding when defense counsel can reasonably be expected to discover on his own material exculpatory evidence already in the possession of the prosecution. We can see absolutely no pragmatic reasons that would justify such a rule and many weighty arguments against it. Indeed, the issue seems so clear to us that it is mystifying and extremely troubling that so many lower courts have adopted the Sixth Circuit's position.

A "due diligence" exception to the *Brady* rule is mistaken for all of the reasons argued so cogently in Karl Schledwitz's petition for a writ of certiorari. But there are additional reasons to reject the Sixth Circuit's rule. Requiring a

defendant to exercise "due diligence" to obtain exculpatory information makes the outcome of a criminal case depend to an intolerable degree on the resources a defendant has available to investigate the facts and ferret out exculpatory evidence on his own. Very few defendants have the means to hire even a single investigator and indigent defendants' requests for funds to hire an investigator are routinely denied -- even in federal cases -- regardless of the reasonableness of their request. How then is a defendant supposed to discover the exculpatory evidence on his own? A harried state public defender juggling several hundred felony cases each year has no time to investigate the facts on his own. And even the wealthiest defendant cannot match the unparalleled investigative resources available to a federal prosecutor. The prosecutor also enjoys the luxury of having ample time to investigate. Once indicted, the accused generally has little time to investigate the facts on his own, even assuming he has the financial resources necessary to conduct an adequate investigation.

As Justice Marshall observed in his insightful dissent in *United States v. Bagley*, 473 U.S. 667, 694 (1985):

> Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the government, defense counsel is not in the position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact,

> and the trier of fact is deprived of the ingredients necessary to a fair decision.

And, as Justice Marshall also noted, *id.* at 667 n.3, the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), establishing a stringent standard for demonstrating ineffective assistance of counsel, "makes an effective *Brady* right even more crucial. Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater."

In short, the basic premise of the "due diligence" exception -- that a defendant exercising due diligence has the ability to discover the exculpatory information concealed by the prosecutor -- is a fantasy. But, even if he does, why should his fate be made to depend on the diligence of his attorney in investigating the facts? "Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of the truth, the government simply cannot avoid responsibility" by placing the burden of discovering the exculpatory evidence on the defendant. *Kyles v. Whitley*, 115 S.Ct. 1555, 1568 (1995). The prosecutor is the representative of a sovereign whose interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Requiring the prosecutor to disclose material exculpatory evidence in the government's possession "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley*, 115 S.Ct. at 1568.

Significantly, the rule advocated here will make a difference only where the defendant is *not* actually aware of the exculpatory evidence withheld by the prosecution. If the defendant is aware of the evidence, the prosecutor's failure to dis-

close it will be treated as non-material. *See Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995).

The "due diligence" cases are also fundamentally incorrect because the exculpatory information withheld from the defendant by the prosecution can, in most instances, never be duplicated by the defense no matter how well-endowed with resources and diligent the defense attorney is. As in this case, the exculpatory information is often contained in a report of an interview prepared by a federal agent or a police officer. Even if the diligent defense attorney interviews the same witness whose prior interview by a law enforcement officer is memorialized in the withheld report, what the defense attorney learns from his own interview cannot possibly substitute for the withheld FD 302 or police report. First, it would be a rare case in which the defense attorney learned substantially all of the same factual information and opinions contained in the FD 302. He may not ask precisely the same questions the FBI agent did. Because the defense attorney will typically not know as much about the facts of the case as the FBI agent, his questions will usually not be as penetrating and far-ranging as the agent's.

Even if he does ask the right questions, he may not get the same answers as the FBI agent for a variety of reasons. The agent will often have interviewed the witness long before the defense attorney, when the facts are still fresh in the witness's mind.[6] The witness may lie to the defense attorney

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[6] In this case the FBI/IRS interview of Jake Butcher took place in 1985 whereas petitioner Schledwitz was indicted in 1992, seven years later. The court of appeals surmised that petitioner could have learned, by interviewing Butcher in 1992, the same things Butcher told the government in 1985. However, Butcher himself swore that he spent the seven years between 1985 and 1992 "trying to erase the memory of the events leading to [his] incarceration." He added that by 1992 he could not recall any of the questions he had been asked by the government during the

(continued)

with impunity but making a false statement to a federal agent is a felony under 18 U.S.C. §1001. The witness may not mention the exculpatory facts to the defense attorney because he does not wish to be called as a defense witness. He may also not wish to be called as a government witness so he attempts to avoid that by telling the agent the exculpatory information.

Even assuming that the defense attorney is lucky enough to ask the same questions and obtain the same answers from the witness, the information is still not nearly as valuable to the defense as the FD 302 report because the 302 report locks the witness in to that version of the facts while the attorney's interview notes do not. If the witness testifies to facts different than those contained in the 302 he can be effectively impeached with the report. If the witness denies telling the FBI agent what is reported in the 302, the FBI agent can be called by the defense to contradict the witness. The agent plainly has no motive to invent statements of the witness *exculpating* the defendant.

A defense attorney attempting to impeach a witness who testifies to something at odds with what the witness told the attorney before trial is in a very different situation. It is improper for the attorney to ask "didn't you tell me" type questions which place the attorney's credibility at issue. Without

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(Fn.6,continued)
1985 interview. Butcher explained that he had grown "extremely paranoid, fearful of governmental reprisal and unsure of [him]self." His aim, in 1992, was to convince defense counsel that he would be a poor witness so that he would be left alone. C.A. App. 355-356; Pet. 15. Butcher succeeded in dissuading petitioner from calling him as a witness. Had petitioner been given the FD 302 report of Butcher's 1985 interview he surely would have been called on to testify in behalf of petitioner.

another witness to the interview the attorney cannot impeach the witness's trial testimony at all. (Despite that, judges regularly deny indigent defendants' requests for funds to pay an investigator and tell the defense attorney that he should do the factual investigation himself.) Even if the attorney had an investigator with him during the interview or the interview was done solely by the investigator, the investigator's impeachment of the witness's false testimony cannot possibly be as effective as impeachment through use of the FD 302 and/or the testimony of an FBI agent. The private investigator works for the attorney and the defendant and therefore has a motive to shade his testimony in favor of the defendant. Moreover, few private investigators make as good an impression on the jury as an FBI agent and their written summaries of interviews are rarely as thorough as the FD 302.

Finally, the "due diligence" rule is objectionable because it invites sterile, subjective arguments about what can be expected of a reasonably diligent defense counsel when the inquiry ought to focus solely on the exculpatory nature of the suppressed evidence. *See e.g.*, *Barnes v. Thompson*, 58 F.3d 971, 976-77 (4th Cir. 1995); *id.* at 984-85 (Murnaghan, J., concurring in the judgment).

The Court is not likely to find a much better set of facts raising this important *Brady* issue than those in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 1996